FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

—against—

IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

ALBERT FOREMAN
of Counsel for
M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Respondent
747 3rd Avenue
New York, New York 10017
212-759-1720

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Statement of the Case

Unpleasant as it is to have to say so, petitioner's "Statement of the Case" is an almost total misrepresentation of the facts. One can only assume that the gross disregard for the record which is manifest on literally every page of the petition herein is the result of the fact that petitioner's present counsel is the *fourth* firm to represent it since the inception of these proceedings. As this Court will note, there is not a *single record reference* to be found in petitioner's "Statement of the Case." The rules of this Court do not *require* that the record be filed with a petition and it is easy to see why petitioner has availed itself of the

privilege of *not* filing, for almost none of the statements made at pages 8-12 of its petition can be supported by the actual record. To make matters worse, we have been through precisely this same ritual three times already, twice before the Appellate Division, Third Department, and once before the Court of Appeals of the State of New York. To find petitioner repeating this grotesque charade yet a fourth time is simply appalling.

As will be seen, *infra,* petitioner's application for a writ of certiorari is based upon "facts" *which are not "facts" at all* and *do not* appear anywhere in the record which was before the courts of the State of New York. In order that this Court be under no misapprehension as to what actually happened the Record on Appeal before the Appellate Division, Third Department is being filed simultaneously with this memorandum. As this Court will readily see, most—if not all—of the "facts," upon which petitioner relies, took place, *if they took place at all* (and one has no way whatever of knowing whether they ever happened or not) *after* the motion to dismiss petitioner's answer had already been submitted and was awaiting decision and outside of the presence of respondent and its counsel.

The true facts of the case, as they actually appear in the filed record, present an entirely different picture than that presently purveyed by petitioner.

This action was brought by the respondent, Ippolito Lutz, Inc. (contractor for general construction), against the petitioner, Cohoes Housing Authority, to recover (a) the contract balance due of approximately $78,000 and (b) the substantial costs it sustained by virtue of a change in the foundation design affecting half of the project. This

redesign was necessitated by the discovery that the sub-soil conditions were not as depicted on the plans and specifications but were, to put it bluntly, akin to a swamp. The project was held up for eleven months while the petitioner tried to decide how to cope with the problem without using piles and pile-drivers (which would have immediately advertised the fact that the site, purchased by the petitioner from a relative of one of the local political figures, was a quagmire). Finally, *eleven months later,* there being no other way out, the petitioner agreed to proceed just as the respondent had told them they had to proceed within two weeks after the condition had been discovered. This delay of eleven months, plus the costs of going from footings to piles, constituted the second branch of respondent's claim.

From the very outset of the litigation, the petitioner attempted to obstruct respondent in every way it could. The record is one long list of refusals to comply on a voluntary basis with the simplest, most ordinary pre-trial procedures, of consistent refusals to obey court orders compelling compliance, and of constant *ex parte* applications for lengthy adjournments and extensions. It is against *this* background that the final motion which resulted in the dismissal of the petitioner's answer must be viewed.

Shortly after joinder of issue, respondent served a Demand for a Bill of Particulars of the petitioner's defenses and counterclaim. The petitioner ignored the Demand, forcing respondent to move for an order compelling compliance. This took place in March of 1966. On the petitioner's *ex parte* application, the motion was adjourned to June 3, 1966. It was then orally argued and an order was issued a week later compelling compliance by petitioner within 60 days. A bill of particulars was served by the

petitioner on August 9, 1966. It was totally inadequate. Another motion, this time for a final order of preclusion, was immediately made (August 26, 1966). The motion was adjourned on the petitioner's request to September 9, 1966, and submitted on that day. Again, proceeding *ex parte,* and without respondent's knowledge, the petitioner made an application for an additional two month's time to submit reply papers. The motion was finally decided and a second order compelling compliance was issued.

In the meantime, respondent sought to examine the contracting officer of the petitioner. The notice to examine was also ignored by the petitioner, thereby necessitating a motion. A motion to examine this individual (John F. Kelly) was made returnable on December 27, 1965; it was adjourned to January 14, 1966 and resulted in an order of the Court dated April 25, 1966 directing his appearance. Kelly, who was at that time still an officer of the petitioner, was not produced.

On January 17, 1966, respondent served a Notice for Discovery and Inspection. The notice was also ignored by the petitioner, which thereafter moved (after its time to do so had expired) to vacate the notice and obtained a temporary stay. On July 25, 1966, after issuing a decision in which it held that all of the items requested were relevant to the issues raised and properly the subject of discovery, an order was entered directing the petitioner to comply within 20 days. The petitioner ignored this order.

Previously, on January 19, 1966, respondent had also served a Notice to Admit upon the petitioner. By Order to Show Cause dated February 8, 1966, the petitioner moved for enlargement of its time to reply until April 15, 1966.

The motion was not decided by Special Term until July 13, 1966, almost two months after the time which the petitioner had sought, at which time an order (July 25, 1966) was issued directing the petitioner to comply within 20 days. The order was served on July 26, 1966. The petitioner ignored this order, defaulted and did not serve any answers whatever to the Notice to Admit.

Despairing of being able to proceed with the normal pretrial procedures, respondent again attempted to obtain compliance with its Notice for Discovery Inspection. Special Term had already entered an order on July 25, 1966, directing the petitioner to comply within 20 days. This order had been ignored. Respondent attempted to obtain a date for discovery, but the petitioner, despite the outstanding order of compliance, *refused* to comply. At this time, the petitioner was being represented by its second attorney, one John A. Brady, Esq. (John F. Kelly by then having been relieved of his position both as contracting officer, counsel and Executive Director). The order of Special Term (July 26, 1966) directing compliance within 20 days had been served immediately on the petitioner's new counsel (R. 30).* During the Summer of 1966, the respondent's counsel had been advised by Mr. Brady that it was likely that he would relinquish his position as counsel for the petitioner and that one William E. Noonan, Esq. would be substituted in his stead. Although no formal stipulation of substitution had been served (nor any other formal notice of pending substitution, for that matter) a copy of Special Term's order of July 25, 1966 was also served upon Mr. Noonan's office (on July 26, 1966) as a courtesy. Mr. Noo-

* References are to Record on Appeal to the New York Supreme Court, Appellate Division, Third Department.

nan did not raise any contention as to non-service (R. 31) as indeed he could not.

From July 25, 1966 to November 21, 1966, the petitioner continued to refuse to make its records available for discovery and inspection. It should be noted that all during this time, the petitioner also continued in default both with respect to the order compelling compliance with respondent's notice to admit and with respect to the order directing it to produce Mr. Kelly for examination.

Respondent then moved for a final order striking the petitioner's answer for failure to comply with the prior order of the Court compelling disclosure (discovery and inspection of its records). This motion was brought on in Special Term on December 9, 1966. The motion was submitted without oral argument. In its answering affidavit, the petitioner's then attorney, Noonan, stated that the petitioner would promptly arrange to comply.

Petitioner's present attorneys (Harvey & Harvey, Esqs.) now contend (p. 8, Petition) that on December 9, 1966, "petitioner's counsel (Noonan) had available the documents sought through discovery". *This is simply not true; nor does the record in any way support that statement.* The Justice at Special Term reserved decision on respondent's motion, to give the petitioner a chance to comply and purge itself, but not a word was heard thereafter from the petitioner. The petitioner *did not* communicate with respondent's counsel and offer to produce the documents covered by the prior order. In fact, although respondent's counsel telephoned innumerable times in an attempt to obtain some relief, not one of those calls was answered.

Petitioner now states (p. 9, Petition) that "in the ensuing weeks, petitioner's counsel attempted to arrange a date for the examination before trial, at which time the documents would be presented to respondent's counsel". This statement is both untrue and irrelevant. The "examination" to which petitioner is apparently referring is that of Mr. Kelly who had, as of that time, not yet been produced; a motion had been made, also returnable on December 9, 1966, asking the Court to fix a date for Kelly's examination as a material witness inasmuch as he was no longer connected with the petitioner (notwithstanding the prior order directing that the petitioner submit him for examination which order had been ignored until such time as he had left the petitioner). This motion had *nothing whatever* to do with the motion to strike the petitioner's answer for failure to comply with the prior order for discovery and inspection.

Kelly's examination was sought as a material hostile witness because he was no *longer under* the control of the petitioner and was subpoenaed directly.

Whether petitioner is now confusing these two separate and distinct matters intentionally or not is of no particular importance; what *is* important is that petitioner's statement that its then counsel "attempted to arrange a date for the examination before trial, at which time the documents would be presented" is absolutely untrue.[1] There is not a shred of substantiation for such a statement in the record or out of it, and the facts are exactly the opposite of petitioner's present contentions.

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[1] Petitioner's counsel had nothing to do with Kelly's examination or with producing Kelly. Kelly was, in fact, at that time suing the Authority himself for legal fees. The documents sought by petitioner's discovery motion were completely independent of Kelly's examination and there was never any suggestion whatever that they were related.

During the five months that elapsed between the submission of respondent's motion on December 9, 1966 and Special Term's decision on May 11, 1967 (striking the petitioner's answer) the petitioner not only did not "attempt" to arrange compliance but, quite the contrary, remained in default of all of the prior orders of the Court which had directed compliance with the various notices of examination and notices to admit previously served.

Thus, on May 11, 1967, after giving the petitioner *almost six months* in which to comply and finding that *no attempt whatever* had been made to do so, the Court finally handed down its order striking petitioner's answer. As Special Term pointed out in its opinion (R. 34), "The present attorney for the defendant first appeared on this motion and indicated to the Court that immediate steps would be taken to comply with the order. *This he has failed to do in the last five months.*" (Emphasis added.)

It is at this point that petitioner's recitation of "the case" departs even from the most minimal contact with the record and involves itself with matters which are not only wholly improper but have already been the subject of admonitory court orders twice and of at least three earlier motions.

At the third paragraph of its "Statement of the Case" (p. 9), petitioner begins a story about what its counsel did *after* the motion to strike was decided and the order issued. We are told that petitioner's counsel went to the Special Term judge (without, of course, advising respondent's counsel that he was doing so), and attempted to get an "order to show cause" for reargument signed. He failed in that attempt and then, for some inexplicable reason, did nothing at all. Whether any of this actually occurred,

respondent has no way of knowing. All that can be said for certain is that no order to show cause was ever signed, and that none of this is in the record before this Court.

What comes next is, however, far worse. Petitioner says (bottom of p. 9) that the Justice at Special Term, after having already handed down his decision (May 11, 1967) striking petitioner's answer, told the petitioner's counsel, "to produce Mr. Kelly on May 22, 1967 and to have all records available".[2] There is absolutely nothing in the record to support any such assertion. Does petitioner seriously expect anyone to believe that after handing down an order *striking the petitioner's answer for failure to comply* with its prior order, the Special Term judge would *then* direct petitioner's counsel to produce the records in question and do all of this without advising respondent's attorney? The fact is that it *did not happen* and there is nothing whatever in the record to support such an assertion.

Petitioner also claims that a "hand truck * * * upon which the papers and records sought by respondent were loaded" was delivered outside the Special Term Judge's Chambers on the day the order to strike petitioner's answer was signed. There is absolutely nothing in the record to support such a statement and it is, in fact, untrue. Respondent's counsel was there and petitioner's counsel did indeed have a cardboard carton with him in chambers but, grotesque as it is to have to say it, the only thing visible

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[2] First of all, Mr. Kelly was not, at that time, under the control of the Authority at all, having by then left the Authority's employment. He was, in fact, in litigation himself *with* the Authority. For petitioner now to say that its then-attorney told the Judge at Special Term that the *Authority* would produce Kelly is absurd, untrue and would be utterly irrelevant even if it were true. Moreover, no such statement was ever made to plaintiff or to plaintiff's counsel.

in that box was a pair of galoshes, a small jumble of crumpled papers and an umbrella, nothing more.

Thereafter, a judgment was entered upon the order of Special Term striking the petitioner's answer. The petitioner promptly filed a Notice of Appeal but, in keeping with its prior pattern of conduct, made no move whatever to perfect that appeal.

Under date of August 26, 1968, respondent moved to dismiss the appeal for lack of prosecution. The Appellate Division, Third Department, of the Supreme Court of the State of New York, issued a conditional order (dated September 16, 1968) dismissing the appeal unless it was perfected by the November 1968, Term of Court.

Petitioner thereupon filed its "record" and brief. Much to respondent's surprise, it was discovered that the "record" filed by petitioner contained five affidavits (pp. 37-59) which had not been before the Court at Special Term when the motion was decided. These "affidavits," it transpired, were alleged to be the affidavits which had been offered in support of petitioner's abortive attempt to obtain an order to show cause for reargument. They had never been served on respondent and, indeed, the first time respondent had ever seen them was when they suddenly appeared as part of the purported "record" filed in compliance with the Appellate Division's conditional order of dismissal. Needless to say, the accompanying brief was full of references to the "facts" which appeared in these spurious affidavits.

Respondent immediately moved to have the affidavits expunged from the record. Before this motion was decided, petitioner conceded the impropriety of its actions and stipulated in writing to remove the offending material from *both* the record and the brief.

Petitioner then physically excised the offending material from the filed records, but *did not revise its brief.* Respondent then was forced to make yet another motion to dismiss the appeal because of petitioner's failure to comply with its stipulation and remove the parallel passages still in its brief, all of which—in substance—repeated the material in the affidavits.

While this motion was pending, the New York City office of Housing and Urban Development (HUD) entered the picture and requested that respondent attempt to negotiate a settlement of the case. Notwithstanding the fact that respondent had, at that point, a judgment against the petitioner, respondent agreed to sit down and negotiate. For the next *five years,* respondent opened its books, records, and offices to a succession of auditors, investigators and consultants, one of whom replaced the other with frightening rapidity. Each time negotiations resumed, there were new faces. Each time, respondent was forced to go back and start at the beginning. Finally, when it became obvious that HUD was not negotiating in anything remotely resembling good faith (its last suggestion having been a figure below what was owed on the contract balance alone), respondent determined to press forward.

The second motion to dismiss respondent's appeal, which had all this time been adjourned because of the ongoing, if fruitless, talks with HUD, was now brought to a head. Under date of May 6, 1975, the Appellate Division, Third Department, issued an order dismissing the appeal unless the petitioner complied with its stipulation and removed the offending material from its brief.

The petitioner refused to do so.

When the appeal was called for argument before the Appellate Division, Third Department, this brazen failure of the petitioner to comply with the Court's order was pointed out. The Court acknowledged the petitioner's failure but heard argument nevertheless. Argument then proceeded completely *dehors* the record (as far as petitioner was concerned) in much the same fashion as had the argument in the brief.

On June 26, 1975, the Appellate Division, Third Department, unanimously affirmed the lower court's decision without opinion. Petitioner thereupon moved for (a) reargument and (b) for leave to appeal to the Court of Appeals. Lo and behold, the same affidavits which petitioner had stipulated were improper and should be expunged from the record and brief, now made their appearance yet again.

On August 21, 1975, the Appellate Division denied both motions.

Petitioner then moved directly before the Court of Appeals for leave to that tribunal. And *again*, the spurious material became a part of the papers. Notwithstanding that the rules of the Court of Appeals of the State of New York specifically provide that a motion for leave to appeal shall be based upon *a copy of the record before the Court below*, the petitioner chose to compile its own, brand new, "record"—a bizarre document consisting of a mixture of the affidavits which had been before Judge Pennock, the five affidavits which had *not* been before Special Term, and—for some unknown reason—the Court's order directing John F. Kelly to appear for examination.

On November 20, 1975 the Court of Appeals denied petitioner's motion for leave to appeal.

Since that time, the petitioner, in addition to making the instant petition, has not only refused to pay the judgment but has claimed that it is exempt from enforcement of any such judgment by virtue of various pledges it has given to the United States of America in connection with its financing arrangements with the Public Housing Administration (PHA) and, then, HUD.

ARGUMENT

POINT I

The federal cases cited by petitioner in support of its application do not in any way—under the facts of this case—require the granting of a writ of certiorari by this Court.

The case of *Hovey* v. *Elliot,* 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, which petitioner cites at p. 13 of the petition, and upon which it places great reliance, does not at all support petitioner's argument. That case did not involve the striking of an answer for failure to comply with a disclosure order or anything remotely like that. In *Hovey,* the defendants, McDonald and White, had been directed by the Court to "pay over to the registry of the Court" the sum of $49,297.50 (op. cit., p. 411) which represented funds previously paid them by a receiver of certain claims settlements (the details of which are in no way relevant). The defendants disobeyed that order and complainants moved to punish "for disobedience of the order as for a contempt". This Court held, in a long and very detailed opinion, that the lower court could not, without violating the due process requirements or the Constitution, punish the *con-*

tempt of an order of the nature there involved by striking the defendant's answer.

In *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 29 S. Ct. 370, L. Ed. 530, from which petitioner quotes at length (Pet., p. 13), this Court made quite clear the distinction between a denial of a right to defend as a mere punishment for contempt and the same sanction when employed as a punishment for the suppression of material evidence in defendant's possession. As this Court said, the striking of an answer is not violative of the due process guarantee where it is the result of, "the refusal to produce material evidence [which] was but an admission of the want of merit in the asserted defense".[3]

The defenses asserted by petitioner were seven in number.

The first defense was predicated on a clause in the contract exculpating the petitioner from any damages for delay. Early in this litigation, petitioner moved for summary judgment urging this clause as a bar. That motion was denied and the denial affirmed by the Appellate Division, Third Department (22 A.D.2d 990, 254 N.Y.S.2d 783 (1964)) which pointed out in its opinion that under New York law such provisions did not insulate a party from delay caused by its own affirmative acts or negligence.

The second defense urged a failure to supply releases of all claims against the petitioner and absence of the architect's certification of completion. The releases were in fact

[3] That the material sought by respondent's discovery order was essential to and inextricably involved with petitioner's defenses was, of course, determined on petitioner's motion for a protective order. We will briefly review those defenses and the items of information sought so that this Court can see the direct connection for itself.

furnished (see Point III, *infra*), and the work subsequently certified as acceptable by the architect.

The third defense simply reiterated the failure of respondent to supply releases from its subcontractors, something it could not have done at the time precisely because petitioner had wrongly refused to pay over the contract balance. Subsequently, and as a result of petitioner's fraudulent conduct (see Point III, *infra*), respondent borrowed money to pay the subcontractors and *did* supply the releases.

The fourth defense alleges a failure to state in the complaint that 30 days have elapsed since the claim was presented to the petitioner for adjustment and that the petitioner has neglected or refused to make adjustment or payment. *Exactly such a statement* appears at ¶8 of the complaint (R. 7). The defense is totally spurious.

The items sought by respondent's original notice to produce were as follows:

1. Original foundation plans for the Polo Grounds and Saratoga sites.

2. All borings and boring plots and plans prepared for or under the direction of the defendant and covering the project sites.

3. All reports on subsurface investigations, strata analyses and underground condition reports prepared for, by or under the direction of defendant and covering the aforementioned project sites.

4. All submissions of proposed foundation revisions.

5. All interim revisions of foundation drawings whether formalized or not.

6. All correspondence between defendant and its architect and/or engineer, dealing with foundation revisions.

7. All stop-orders issued by defendant to plaintiff.

8. All correspondence accompanying the stop-orders.

9. All requisitions for partial payments submitted by plaintiff to defendant.

10. All worksheets, calculations and tabulations prepared by or under the direction or at the request of defendant with regard to requisitions submitted by plaintiff.

11. All written approvals of requisitions to include all written disapprovals of requisition items and supporting reports or recommendations by inspectors, architects or engineers with regard to such items.

12. Daily Job Reports and Progress Reports kept by anyone in defendant's employ or at defendant's request.

13. Daily Job Progress memoranda kept by the Contracting Officer.

14. All punchlists prepared by, under the supervision of or at the request of defendant.

15. All worksheets and reports supporting items appearing on punchlists.

16. All photographs made of items appearing on punchlists.

17. Laboratory test reports of concrete made at the time of installation of concrete.

18. Laboratory reports of tests of concrete made subsequent to the installation of concrete, but prior to the commencement of this action.

19. Progress schedules prepared by defendant.

20. All daily, weekly and monthly progress reports furnished by defendant to the Public Housing Authority.

21. All requisitions and reports submitted by defendant to the Public Housing Authority.

22. All field notes and inter-office correspondence relating to foundation revisions and concrete testing.

The relevance of the items sought to the issues raised both as to respondent's affirmative claims for increased costs due to the change in foundation design and petitioner's counterclaims for allegedly defective work is, we respectfully submit, at once obvious. As we have pointed out *supra*, the relevance and propriety of the demand was ruled upon by the Court (R. 25) upon petitioner's motion for a protective order, and petitioner took no appeal. It can hardly be argued at this point that the material sought did not constitute evidence material and necessary to the prosecution of the action.

Under the test in the *Hammond* case, *supra*, the striking of petitioner's answer was amply justified. As this Court in *Hammond* pointed out (at p. 347) the order of the Trial Court striking the defendant's answer for failure to produce certain designated books and records would only have been repugnant to the due process clause *if* it had been

issued in the face of a *bona fide* effort to comply with the directive provisions of that order. But, "[A]s the Hammond Company absolutely declined to obey the order * * * it is not within our province to afford relief because of an error of judgment in that respect".

The case of *Societe Internationale* v. *Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2nd 1255, does not, given the facts of the matter at bar, support petitioner's contention. To be sure, in that case, this Court had before it an order of the District Court which had struck the complaint because of the plaintiff's failure to comply with a prior order of the Court requiring disclosure of various books and records. But the Master's Report, which was part of the record, showed that the production of the records in question had been blocked by the Swiss Government "acting in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the * * * records" (*id.* at 201). There was no showing of collusion between the plaintiff and the Swiss Government. The Master found that the plaintiff had "sustained the burden of proof placed upon it and has shown good faith in its efforts to comply with the production order" (*id.* at p. 201). The District Court struck the complaint notwithstanding these findings.

This Court went on to review the rules announced in both *Hovey* v. *Elliott, supra,* and *Hammond Packing Co.* v. *Arkansas, supra,* and stated:

> "In *Hovey* v. *Elliott, supra,* it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was

substantially modified by *Hammond Packing Co.* v. *Arkansas, supra,* where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend 'as a mere punishment'; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was but an admission of the want of merit in the asserted defense.' 212 U. S., at 350-351. But the Court took care to emphasize that the defendant had not been penalized '. . . for a failure to do that which it may not have been in its power to do.' All of the State had required 'was a *bona fide* effort to comply with an order . . . , and therefore any *reasonable showing of an inability to comply* would have satisfied the requirements . . .' of the order. 212 U. S., at 347." (emphasis added) (357 U.S. at 209)

This Court then went on to discuss whether the due process requirement would be violated by striking a complaint because of the plaintiff's "inability despite good faith efforts" to comply and held that, on the record before it, the plaintiff should not have been so penalized.

The facts in the matter at bar are in no way analogous. Petitioner at all times had custody and control of the records in question. At first it resisted producing them and moved to vacate the demand on the fallacious ground that the information sought was not relevant. The Court at Special Term denied petitioner's motion, held specifically

that the documents were indeed relevant and on July 25, 1966 ordered their production. Petitioner refused to comply, and after four more months, respondent moved again for relief. On the return date of the motion, petitioner's attorney apparently "indicated to the Court that immediate steps would be taken to comply with the order" (R. 34). *Five more months* passed during which all attempts to obtain compliance went for naught. All during this time, the judge at Special Term withheld decision. By virtue of other motions brought on, the Court became aware of the fact that petitioner still had not complied despite its promise. Then the Court handed down its decision (May 11, 1967):

> "The defendant has failed to comply with a prior order of this court. *The defendant was obligated by the prior order of this court to produce the records within twenty days. No valid excuse has been offered by the defendant for its failure to comply and certainly ignoring an order of the court is willful under the circumstances.* Otherwise the orderly process of the administration of justice pursuant to the rules would be abandoned. The present attorney for the defendant first appeared on this motion and indicated to the court that immediate steps would be taken to comply with the order. *This he has failed to do in the last five months.*" (emphasis added) (R. 24).

Certainly the record is absolutely barren (as the Court pointed out) of any "excuse" much less any showing of "inability" to comply as was found in *Societie Internationale* (*supra*). There was nothing to prevent petitioner from complying for ten long months, yet out of sheer intransigence it chose not to do so. Petitioner cannot, under

the facts of this case, invoke the holding in *Societie Internationale* for its benefit. That decision is, in fact, strong authority *in support* of precisely the action taken by the Courts of the State of New York.

POINT II

The New York cases cited in the appendix to the instant petition do not in any way support petitioner's contentions; they are wholly distinguishable on their facts and set forth a basic rule of law which, when applied to the facts of the instant case, amply supports the action taken.

Petitioner places a great deal of emphasis on the case of *Feingold* v. *Walworth Bros., Inc.,* 238 N.Y. 446 (1926). That case is not on point. Bearing in mind that in the instant case we are dealing with a consistent pattern of obstructionary tactics employed by petitioner and a persistent refusal to produce documents concededly in its possession and of unquestioned relevance to the matters at issue, it is hard to see what possible application *Feingold* can have. In *Feingold,* the Court of Appeals vacated two judgments. The first was vacated because, as the Court was at pains to point out, it was clearly improper to strike the answer of the *individual* defendants when the order of disclosure which had been disobeyed had not been directed to them in the first place. As to the second judgment, against the corporate defendants, the Court pointed out that there was no evidence whatever that the documents which had been demanded *were even in existence.*

In the case at bar, the order of disclosure was specifically directed to the petitioner and the documents as to which

disclosure was sought were concededly in existence. In short, *Feingold* has nothing whatever to do with the matter at bar.

We will next deal briefly with each of the other cases mentioned on page A-16 of the petition.

It is to be noted in the first instance that a number of these cases arose under a different statutory scheme than that now in effect. Prior to the institution of the Civil Practice Law and Rules, a failure to appear for examination or to comply with other discovery proceeding demands gave rise immediately to a motion to dismiss. Under the present state of the New York State rules two motions are necessary. First a motion must be made for an order compelling compliance with a demand for examination before trial or other discovery proceedings and only when that order has been subsequently violated may a further motion be made to vacate the answer on the ground of a violation of the first order. This is, of course, quite a different situation. The offending party is now given *two bites* of the apple instead of one and the question of "wilfulness" assumes therefore a rather different aspect under these new statutory circumstances. When a party has already been *warned* by the entry of a Court order *directing compliance* with previously flaunted discovery proceedings, a further refusal to comply may hardly be said to be not wilful absent a very strong showing of excusable cause. It may be noted that there is *no showing whatsoever* of excusable cause in the instant record nor was there any attempt by petitioner to explain the fact of its lengthy noncompliance.

With the foregoing by way of background, let us now turn our attention to the specific cases cited by petitioner.

Nomako v. *Ashton,* 22 A.D.2d 683 (1st Dept., 1964) was a case involving defendant's failure to appear for an examination before trial. There is no indication in the information as reported of a prior order directing appearance for examination although the case did arise a few years subsequent to the enactment of the Civil Practice Law and Rules. Furthermore, while the Court did state that as a matter of general policy "disposition of controversies on the merits is favored" it also pointed out that in order to vacate a default judgment under such circumstances there must be a showing of a meritorious defense, excusable default and the absence of wilfulness. It may be noted that petitioner made absolutely no attempt to establish the existence of a meritorious defense, made no explanation of the default and made no showing of an absence of wilfulness.

The case of *Dubois* v. *Iovinelli,* 15 A.D.2d 616 (Third Dep't, 1961), was decided under Section 299 of the Civil Practice Act. The memorandum decision states only that the moving affidavit did not demonstrate the default of the defendant-appellant to be clearly deliberate or contumacious. Such could hardly be said given the record in the instant matter. To put it bluntly, the record in the matter at bar shows quite clearly that petitioner had continually thumbed its nose at every judicial direction to which it was subject. Motion after motion had been made in order to force it to comply with the most fundamental requirements of orderly litigation.

The cases of *Mills* v. *Capello,* 6 A.D.2d 841 (Second Dept. 1958), and *Page* v. *Lalor,* 24 A.D.2d 883 (Second Dept. 1965) both were decided on the basis of an absence of a showing of wilfulness. On the facts revealed by the record it can hardly be said that the refusal to comply was not wilful.

Indeed, it was not only wilful but *continued over a period far in excess of the time given by Special Term in its original order* in which petitioner was to comply.

In *Balsam* v. *Frank Nicolosi Building Co.,* 36 A.D.2d 533, the Court pointed out that the witnesses which defendant-appellant had failed to produce were unavailable, their whereabouts concededly unknown, and that, therefore, defendant's failure to produce them was hardly "willful."

In *Cinelli* v. *Radcliffe,* 35 A.D.2d 829, there is no indication in the opinion of what the underlying facts were, only that a witness had failed to show up for an examination before trial and that the "moving affidavit" had failed to establish that the default was willful."

Thornlow v. *Long Island RR Co.,* 33 A.D.2d 1027 (like *Balsam, supra*), involved a faliure to produce a witness (a former employee) who was not under the defendant-appellant's control. Therefore, the Court held that the failure could not be characterized as "willful."

In *La Manna Concrete* v. *Friedman,* 34 A.D.2d 576 (as in *Cinelli, supra*), the opinion contains no underlying facts at all. Again, the case involved failure of a witness to appear—a situation quite different than a continued refusal over a ten month period to produce records and documents pursuant to a discovery order.

Finally, we come to *Goldner* v. *Lendor Structures,* 29 A.D.2d 978. Just why petitioner cited *this* case is hard to understand for it holds dead against it. In *Goldner,* the lower court had denied plaintiff's application for sanctions (not, it may be noted, involving a request to strike the

answer). The Appellate Division noted that the defendant had failed to appear for an examination before trial three times and held that:

> "In our opinion, defendant's conduct reflected *a pattern of behavior* which was contumacious and tantamount to willful default, *well within the purview of* CPLR 3126 * * *."

If a failure to appear for an examination before trial three times is "contumacious and willful," then how much more contumacious and willful was petitioner's conduct, only the latest in a long and sorry story of obstructionary, dilatory tactics and refusals to comply with orders of the Court; more than enough, we respectfully submit, to warrant the action taken.

POINT III

The striking of petitioner's entire answer, inclusive of its counterclaims, was correct and proper under the circumstances.

Petitioner also argues that, even if a dismissal of the *answer* was proper under the circumstances, the order should not have gone so far as to include the counterclaims. This argument, under the facts of this case, is totally misplaced.

Petitioner's counterclaims were two in number—first, a claim for liquidated damages for delay in the sum of $27,000.00. This claim was predicated on the very same period of "delay" for which plaintiff sought relief, i.e., that period during which approximately one-half the project had been stopped cold by petitioner's own "stop order"

while it tried (unsuccessfully) to figure out how to redesign the foundations without using piles.

The second counterclaim asserted "backcharges" for various defective items. The history of these claims is very instructive and, if anything, serves to highlight the utterly reprehensible conduct in which petitioner constantly engaged.

The items of alleged "backcharges" all involved work of respondent's various subcontractors. Not being paid, because petitioner had withheld payment from respondent on account of these items, various of these subcontractors filed mechanic's liens and a foreclosure action was commenced. As trial approached, the case was conferenced before the Judge at Trial Term. At that conference—at which respondent's counsel was present—respondent pointed out that it could not pay its subcontractors if their work was not accepted by the petitioner. After considerable discussion, in which the fallacy of most if not all of the petitioner's claims were pointed out, the petitioner agreed to have its engineers *re-examine* the work in question and respondent agreed that if, upon re-examination, the petitioner accepted the work of the various subcontractors, respondent would forthwith pay those subcontractors the balance due them and obtain releases of lien, upon receipt of which petitioner promised to release the contract balance (which had been withheld solely on the basis of these alleged charges). All of this was agreed to by the Executive Director of the petitioner in front of the Judge sitting at Trial Term and in the presence of a number of other attorneys.

Thereafter, the engineer's re-examination was held, and the petitioner *accepted* the work of the subcontractors in-

volved, in *writing*. Respondent then went out and *borrowed* the money necessary to pay the subcontractors, did pay them, and obtained releases of the mechanic's liens which it then forwarded to the petitioner.

The petitioner, however, did a sudden about-face, repudiated the agreement it had made and refused to pay respondent although it had accepted in writing the work of the subcontractors against whose work it had earlier asserted its backcharges.

Under the circumstances, it is respectfully submitted that there is not an iota of validity to petitioner's argument with respect to the dismissal of its *entire* answer, inclusive of counterclaims. It may be noted that the documents concerning which discovery was sought were as intimately involved with the alleged "counterclaims" as they were with petitioner's affirmative defenses.

POINT IV

Petitioner's consistent obstructionary tactics, its long history of refusal to obey orders of this Court, and its clear and unexplained flaunting of the order of Special Term directing it to submit to discovery proceedings for a period in excess of five months more than amply mandate an affirmance of Special Term's order striking petitioner's answer.

In the case of *Laverne* v. *Incorporated Village of Laurel Hollow*, 18 N.Y.2d 635 (1966), the Court of Appeals sustained the dismissal of a complaint, in the exercise of sound judicial discretion, where the plaintiff's *totality of conduct* evidenced a clear and wilful failure to purge itself of disobedience. Thus, the Court stated:

"Notwithstanding the lower court's error in determining that plaintiff's motion for a protective order pursuant to CPLR §3103 should have been addressed to the Appellate Division, rather than to the trial court, the court properly dismissed the complaint—in the sound exercise of its judicial discretion—because of plaintiff's willful failure to purge himself of his disobedience of prior court orders compelling disclosure on matters relevant to his causes of action and defenses thereto (CPLR §3126). And while it is true that plaintiff's 3103 motion automatically suspended all disclosure proceedings regarding the particular matter to be disclosed, the making of such a motion did not in any way immunize Laverne from the dismissal of his complaint. The Appellate Division affirmed this dismissal because Laverne's totality of conduct evidenced a willful failure 'to purge himself of his prior disobedience', a factual determination supported by the evidence and beyond the scope of this court's review."

Similarly, in *James* v. *Powell,* 26 A.D.2d 525 (First Dep't 1966) reversed on other grounds, 19 N.Y.2d 249 (1967), the defendant's answer was stricken for failure to appear for examination before trial in accordance with a prior court order. See also *Abazoglou* v. *Tsakalotos,* 36 A.D.2d 516 (First Dep't 1971)—where a similar result was reached and sustained where a prior order of Special Term had directed appearance for examination before trial under CPLR 3126 and plaintiff had failed to comply and also failed to appeal from the order). See also, *Soares, Inc.* v. *Guertzenstein,* 279 App. Div. 744 (First Dep't 1951).

The comment appearing following CPLR Section 3126 in volume 7B of McKinney's Consolidated Laws is most instructive. While this commentary is, of course, not law, it is well worth quoting:

> "Though the adverb 'wilfully' in the statute relates to the disobedience of something other than a court order, it applies as a practical matter to a court order as well. If a disclosure directed by court order can be shown impossible to carry out, a sanction will not be imposed under CPLR 3126. But there is an important difference. If the disclosure was previously directed to be made by a court order, whether by motion under CPLR 3124 or 3103 or any other provision, the disclosability of the datum or thing under the terms of CPLR 3101 and the feasibility of obeying the order were presumably passed upon on that application. Unless that order was made ex-parte, or something occurring afterwards has impeded the disclosure, the findings and conclusions which resulted in that order would be the law of the case (a kind of intra-action res judicata doctrine) and would not ordinarily be reviewed by the judge hearing the CPLR 3126 motion."

It is respectfully submitted that the record more than amply supports the action taken by Special Term in striking petitioner's answer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ALBERT FOREMAN
of Counsel for
M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Respondent
David Morgulas of Counsel
747 3rd Avenue
New York, New York 10017
212-759-1720